UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMUNITY HEALTH SERVICES, INC. d/b/a MIMBRES MEMORIAL HOSPITAL AND NURSING HOME	:	Case Nos. 28-CA-16762 28-CA-17278 28-CA-17390
vs.	:	
UNITED STEELWORKERS OF AMERICA DISTRICT 12, SUBDISTRICT 2, AFL-CIO-CLC	:	

MIMBRES MEMORIAL HOSPITAL AND NURSING HOME'S REPLY BRIEF TO THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO MIMBRES' EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM L. SCHMIDT

As the Respondent in the above-referenced cases, Mimbres Memorial Hospital and Nursing Home (hereafter, "Mimbres" or the "Hospital") hereby files, by and through the Hospital's Undersigned Counsel, this Reply Brief to the Answering Brief filed by the Acting General Counsel (hereafter, for ease of reference, the "General Counsel") on September 16, 2010 in response to Mimbres' Exceptions to the Supplemental Decision issued by Administrative Law Judge William L. Schmidt (hereafter, at times, the "Judge") on July 28, 2010.

ARGUMENT

1.) The Remedy Does Not and May Not Apply Prospectively

The General Counsel makes no attempt to argue, nor could he, that the Decision issued by the Board as part of the underlying proceedings includes any language that expresses any intention for the backpay remedy awarded by the Board to apply prospectively. Likewise, the General Counsel does not cite to any legal authority to support the Judge's position (which was, of course, itself unsupported) that, in cases where an employer has unlawfully changed employees' working conditions, the "standard remedy" is for any backpay awarded by the Board to apply prospectively.

In addition, the General Counsel does not contest the fact that, as part of the underlying proceedings before Judge Parke, the General Counsel had the opportunity, by virtue of the hire of Mr. Pattarozzi and Ms. Gordon, to allege that Mimbres' hire of respiratory department employees at fewer than forty (40) hours / week represented an unlawful departure from the Hospital's hiring practices. Thus, the General Counsel may not now attempt to procure a backpay award for these future hires. See Jefferson Chemical, 200 NLRB 992 (1972).

Lastly, the General Counsel's effort to address Mimbres' legal authority, NLRB v. Dodson's Market, Inc., 553 F.2d 617 (9th Cir. 1977), and Chauffeurs, Teamsters and Helpers Union No. 171 v. NLRB, 425 F.2d 157 (4th Cir. 1970), simply piggybacks upon the Judge's attempts to distinguish the cases. The Judge's attempt to distinguish Dodson's Market is essentially comprised of a summary of

the case barren of any explanation as to why the case, as summarized by the Judge, would not apply to the above-referenced cases. See Supplemental Decision, page 13. In fact, Dodson's Market is perfectly applicable. Like here, the unlawful conduct at play in Dodson's Market consisted of an unlawful reduction of hours and an award of backpay by the Board. The Court held the Board went too far by the supposition that, but for the hours reduction, the future employee would have been hired at a higher level of hours, and saw no evidence that the employee was subject to any independent discrimination at the time of her hire. 553 F.3d at 619-20. In the case now before the Board, the General Counsel has attempted to secure a backpay remedy for future hires based upon the very same rationale, and as noted above, in spite of the clear opportunity, failed to even allege that future hires were the subject of discriminatory conduct, i.e., unilateral change to existing hiring practices.

In the case of Local 171, the Judge refers, a few times, to the fact the employer was a "successor" employer, but does not explain why that fact cancels the applicability of the case. See Supplemental Decision, pages 13-14. The fact the employer was a successor did not privilege the employer to act unilaterally. Indeed, just as the Board found the hours reduction implemented by Mimbres to be unlawful, the Board found the changes made by the successor employer to be unlawful. Moreover, in spite of the perspective shared by the Judge and the

General Counsel, the changes made by the successor employer were of a far greater magnitude. In particular, contrary to the change implemented by Mimbres, the successor employer's changes were not limited to a solitary change to a solitary department, but rather, applied to the entirety of the predecessor's employees, irrespective of their department, and affected the employees' wages, hours and other conditions of employment. 425 F.2d at 158. And yet, in spite of the sweeping nature of the employer's changes, the Court did not lose sight of the fact that, as for future hires, they did not experience any "sudden change" in the employment relationship. Id. at 159. Here, similarly, the employees hired by Mimbres subsequent to the hours reduction did not suffer any change in their employment relationship. Indeed, like the employee at issue in Dodson's Market, these employees accepted employment with Mimbres on the terms, including the hours, offered.[1] 553 F.2d at 619.

2.) Mimbres' Classification System Is Immune From Collateral Attack

As elsewhere, the General Counsel urges the Board to defer to the method by which the General Counsel chose to identify Mimbres' full-time employees (that is, the employees eligible for the remedy), because the General Counsel's

[1] In fact, the record in Dodson's Market included evidence that the employee specifically requested, but was denied full-time employment. 553 F.2d at 619. Even so, the Court concluded the employee was too far removed from the unlawful action, and therefore, not entitled to any backpay.

methods need only be "reasonable." See Answering Brief, page 5; see also General Counsel's Limited Exceptions. In fact, the case law referenced by the General Counsel holds only that reasonableness is the standard that should apply to a backpay formula, and extends no comparable deference to the General Counsel's duty to identify the employees eligible for a backpay remedy. In that area, as explained by Mimbres elsewhere, the Board enjoys no "wiggle room." See Mimbres' Answering Brief to General Counsel's Limited Exceptions, page 7.

The General Counsel urges the Board to reject Mimbres' position that the remedy-eligible employees should be identified by use of the Hospital's classification system. The General Counsel claims that, as part of the proceedings before the Judge, "numerous" objections were raised by the General Counsel as to Mimbres' position, but does not offer the Board even one reference to the record. See Answering Brief, page 5. By way of further error, the General Counsel claims the Judge described Mimbres' position as "problematic." Id. at page 7. In fact, the Judge described the task of identifying the remedy-eligible employees as problematic. See Supplemental Decision, page 8. Most importantly, the General Counsel asks the Board to reject the Hospital's system of employee classification because the "system is not reasonable or rationale." See Answering Brief, at page 6. At the same time, the General Counsel simply ignores the cases referenced by Mimbres to the effect the Board lacks the authority to judge the reasonableness of

an employer's policies. See Mimbres' Brief in Support of Exceptions, page 17. And yet, at once, that is precisely what the General Counsel seeks of the Board and precisely what, respectfully, the Board may not do.

As a last note, Mimbres should address the point made by the Judge, and echoed by the General Counsel, that Mimbres' position would lead to the "absurd result that almost no one was entitled to backpay under [the] remedial order." See Supplemental Decision, page 8; Answering Brief, pages 6-7. For obvious reasons, the Judge should not have viewed the Hospital's defense with any prejudice on account of the fact the defense would exclude employees, even a large number of employees, from the remedy. Indeed, one could safely presume that the very design of most defenses available to employers in cases like the one at bar is to eliminate, or at least reduce a claimed backpay liability. The Judge should have viewed Mimbres' defense based solely upon the merits, and not have approached the defense with what was clearly a results-oriented mindset.

3.) Employees' Interim Earnings: The Law of the Case

At the outset, Mimbres should quote the General Counsel's own words: "It is not disputed the Board ruled in that supplemental decision that Respondent's Amended Answer had properly placed employee interim earnings into issue." See Answering Brief, at page 9. The General Counsel claims, however, that the Board's rulings were intended to address only the question of whether Mimbres'

interim earnings defense was pled with sufficient specificity, not whether the defense itself was valid. Id. The General Counsel neglects to account for the fact that, as part of the motion which prompted the Board's rulings, the General Counsel absolutely addressed and attacked the validity of Mimbres' interim earnings defense. See Counsel for the General Counsel's Motions to Strike Portions of Respondent's First Amended Answer to Compliance Specification and for Summary Judgment, at pages 11-14. The idea that the parties would present the Board with the question of whether Mimbres' defense was valid, but the Board would decide only the question of whether defense was pled sufficiently, casts the Board in the light of a terribly inefficient agency and is patently absurd.

The General Counsel goes on to make another demonstrably false assertion: "Respondent did not attempt to present such evidence related to the interim earnings issue in the record for [the] hearing [before Judge Schmidt] and did not make any arguments on the record objecting to ALJ Schmidt's ruling for that purpose." See Answering Brief, page 10. In point of fact, as part of the proceedings before the Judge, Mimbres made an offer of proof as to the interim earnings of two employees and restated the Hospital's objections to the Judge's previous, and erroneous, rulings. See Tr. 191-92.

In an effort to change the law of the case, and explain why evidence of employees' interim earnings would not be relevant, the General Counsel states the

employees "arguably" did not have to seek interim employment, "because they were still working full time for Respondent during the material times they were subject to Respondent's unlawful unilateral actions." See Answering Brief, page 9. In the process, of course, the General Counsel seeks to have the question of the employees' working status both ways, insofar as the General Counsel argues the employees are eligible for the backpay award because they did not work a sufficient number of hours, but at the same time, the employees are excused from seeking interim employment because they did work a sufficient number of hours. Moreover, the analogies offered by the General Counsel are off point. An employer's decision to deny an employee a bonus or apply a pay shortage does not increase the employee's time away from the workplace, and therefore, increase the employee's opportunity to work for another employer. By contrast, an employer's reduction of hours has precisely these effects, particularly in cases where an employee already works for another employer. See Rice Lake Creamery Co., 151 NLRB 1113, fn. 4 (1965). Indeed, as shown by Mimbres' offer of proof, at least two employees increased their hours of work at another employer on account of the reduction in their hours at Mimbres. The difference between an employee discharge, where the duty to seek interim employment is unquestioned, and a reduction in an employee's hours, is one only of degree, not kind.

In any event, the Board has ruled already that Mimbres had properly placed the employees' interim earnings at issue, and the Judge's rulings to the contrary must be rejected.

4.) Mimbres' Backpay Liability Should Be Tolled

The General Counsel repeatedly stresses that Mimbres was bound to rescind the hours reduction, but chooses to ignore the Hospital's point that the purpose of the rescission was to set the stage for negotiations between the Hospital and the Union, a purpose that could never be realized due to the Union's failure to communicate in any fashion with the Hospital. Though the General Counsel makes an effort to note what evidence is not in the record, the General Counsel does not address what evidence was received into the record. Specifically, the record shows, albeit by offer of proof, that, upon the Court of Appeals' enforcement of the Board's underlying Order, Mimbres made repeated efforts to commence negotiations with the Union, which never communicated any refusal or even reluctance to negotiate with the Hospital so long as the Hospital failed to rescind the hours reduction. In fact, the Union has been entirely absent from the compliance proceedings now before the Board.

In summary, by taking the position that Mimbres' backpay liability has not tolled, the Judge and the General Counsel have closed their eyes to the reality in which the Union has shown no desire or intention to bargain with the Hospital, and

traced out yet another way to impose a backpay liability in favor of a large audience of employees, for any other outcome would be, they believe, "absurd."

5.) Mimbres' Exceptions to the Judge's Interest Award Are Unchallenged

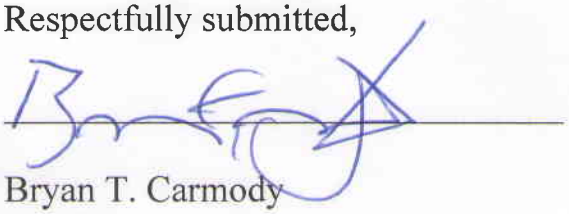
The General Counsel failed to set forth any arguments as to why the Judge did not err by virtue of the award of interest. Accordingly, Mimbres respectfully requests that the Board grant the Hospital's related Exceptions *pro forma*.

CONCLUSION

For all the reasons set forth above, Mimbres respectfully requests that the Board reject the arguments set forth in the General Counsel's Answering Brief and grant Mimbres' Exceptions in their entirety.

Dated: October 1, 2010

Respectfully submitted,



Bryan T. Carmody
134 Evergreen Lane
Glastonbury, Connecticut 06033
(203) 249-9287
bryancarmody@bellsouth.net

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STATEMENT OF SERVICE OF MIMBRES MEMORIAL HOSPITAL AND NURSING HOME'S REPLY BRIEF TO THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO MIMBRES' EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM L. SCHMIDT

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the original of Mimbres Memorial Hospital and Nursing Home's Reply Brief to the Acting General Counsel's Answering Brief to Mimbres' Exceptions to the Supplemental Decision of Administrative Law Judge William L. Schmidt (hereafter, the "Reply Brief") is being filed this date by Mimbres Memorial Hospital and Nursing Home in the above-captioned matter via E-Filing at www.nlrb.gov, being the website maintained by the National Labor Relations Board.

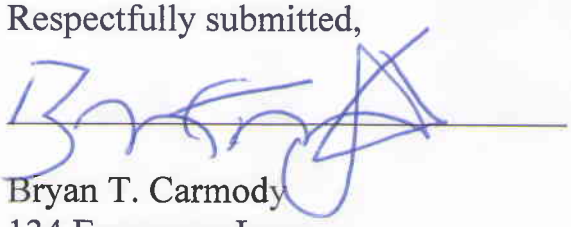
The Undersigned further certifies that a copy of the Reply Brief is being provided this date to the following by way of E-mail and Federal Express:

David T. Garza, Counsel for the General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue SW, Suite 310
Albuquerque, New Mexico 87103
(505) 248-5130 (phone)
(505) 248-5134 (fax)
David.Garza@nlrb.gov

United Steelworkers of America, District 12,
Subdistrict 2, AFL-CIO-CLC
Charging Party
Attention: Manny Armenta
3150 Carlisle Blvd. NE, Suite 110
Albuquerque, NM 87110
(505) 878-9756
(505) 878-0763
marmenta@usw.org

Dated: October 1, 2010

Respectfully submitted,



Bryan T. Carmody
134 Evergreen Lane
Glastonbury, Connecticut 06033
(203) 249-9287
bryancarmody@bellsouth.net